In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 570

DONALD R. LORD, ET AL., PETITIONERS

v.

ALVIN M. KELLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Since the spring of 1962 the Internal Revenue Service has been conducting an investigation into the income tax liability of petitioners Bernard G. McGarry and Marie G. McGarry (Pet. App. 2a, 9a). In April 1962 a special agent of the Service called upon Donald R. Lord, a certified public accountant, at his home and obtained from him various records of his clients (Pet. App. 2a). Although the agent had prepared a summons for the production of those records, he did not serve it prior to demanding the documents but merely left it with Lord upon leaving with the records (Pet. App. 2a–3a, 9a–10a).

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Approximately a year and one-half later, in November 1963, Lord and his clients (the present petitioners) filed an action in the District Court for the District of Massachusetts alleging that the agent's obtaining of the records in April 1962 constituted an unlawful search and seizure (Pet. App. 3a, 9a, R. 6–17). They sought return of the records and an injunction barring the government from using the information it had obtained therefrom (Pet. App. 3a). After hearing, the district court held that "no adequate basis for the seizure of the clients' records existed" (*Lord* v. *Kelley*, 223 F. Supp. 684, 689 (D. Mass.) (Pet. App. 15a)). The court ordered the government to return the records and granted a broad injunction against using either them or information obtained therefrom (R. 66–67). The injunction further provided, however: "[N]othing in this injunction shall preclude the United States or its agents from acquiring by appropriate warrant, subpoena, summons, or other due process of law, the production of any record or paper covered by the summons" that was in the agent's possession when he arrived at Lord's home (R. 67). The court indicated (223 F. Supp. at 691; Pet. App. 18a–19a) that the purpose of this proviso was to restore the previous *status quo* by depriving the government of every advantage it had gained unlawfully, but not to penalize it by denying it the opportunity to use the knowledge which it had before the agent had obtained the records from Lord.

The government immediately returned the records (Pet. 9). The petitioners appealed, however, con-

tending that the proviso permitting the government to seek the same records was improper, and that the court should have enjoined the government from ever attempting to obtain them (R. 93–94). The court of appeals dismissed the appeal for lack of jurisdiction, on the ground that that issue would arise only if and when the government sought to obtain the records in some further proceeding. *Lord* v. *Kelley*, 334 F. 2d 742 (C.A. 1), decided July 13, 1964 (Pet. App. 1a–8a).

In March 1964, the government served upon some of the petitioners summonses for production of documents which the agent previously had obtained from Lord. After the court of appeals dismissed the appeal in the present case, the government instituted a proceeding in the district court to enforce the summonses.

The district court ordered compliance with the summonses. Petitioners have appealed, and the court of appeals has stayed the enforcement order and directed that briefs be filed in sufficient time to enable it to hear the appeal during its December 1964 Term.

The substantive question which petitioners sought to litigate in the present case—whether the government should be barred from ever using any of the materials that the agent had obtained from Lord—is presently pending before the court of appeals on the appeal from the order enforcing the summonses. The issue in the present case—whether the court of appeals improperly dismissed the earlier appeal raising the same issues—is, as a practical matter, moot. In the circumstances, there is plainly no occasion for

this Court to review that dismissal. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

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